

TESTIMONY OF
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NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE
ON H.R. 4781
THE MARINE MAMMAL PROTECTION ACT AMENDMENTS OF 2002
BEFORE THE
COMMITTEE ON RESOURCES
SUBCOMMITTEE ON FISHERIES CONSERVATION, WILDLIFE AND OCEANS
U.S. HOUSE OF REPRESENTATIVES
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Mr. Chairman and Members of the Subcommittee, I am Dr. William T. Hogarth, Assistant Administrator for Fisheries in the National Oceanic and Atmospheric Administration of the Department of Commerce. I want to thank you for inviting me to testify before the Subcommittee today on the reauthorization of the Marine Mammal Protection Act (MMPA). Additionally, I commend you, Mr. Chairman, Members of the Subcommittee, and your staff, for all the work you have done to move forward on the reauthorization of the Marine Mammal Protection Act (MMPA).

The National Marine Fisheries Service (NMFS) administers the MMPA, the principal Federal legislation that guides marine mammal protection and conservation policy in U.S. waters, in conjunction with the U.S. Fish and Wildlife Service (FWS). Under the provisions of the MMPA, NMFS is responsible for the management and conservation of more than 140 stocks of whales, dolphins and porpoises, as well as seals, sea lions and fur seals. The FWS is responsible for the remaining marine mammal species (polar bears, walruses, manatees, dugongs, and marine and sea otters).

At the MMPA reauthorization hearing held by this Subcommittee last October, I presented the status of NMFS' implementation of the 1994 amendments and the impacts this legislation has had on marine mammal conservation and management. The 1994 amendments made comprehensive changes to the MMPA, enacting such programs as the Commercial Fisheries Incidental Take Regime; Marine Mammal Stock Assessments; Permits for Scientific Research, Enhancement, and Public Display; Incidental Harassment Authority; Cooperative Agreements with Alaska Natives; and several others that have helped our agency improve its conservation and management of marine mammal stocks. While NMFS has made considerable progress in implementing these amendments, the agency continues to investigate ways to improve protection and

management of marine mammals, while allowing for commercial, recreational, scientific research, and other human activities.

Today, I will focus more closely on some of the ways that we as an agency feel the MMPA could be amended to allow us to better protect and conserve marine mammals. I will begin by providing comments on the Subcommittee's bill, H.R. 4781, the "Marine Mammal Protection Act Amendments of 2002," as requested. Additionally, I will identify some areas of the Act that could be improved to enhance the agency's ability to fulfill its responsibilities under the MMPA.

Comments on H.R. 4781

Mr. Chairman, we appreciate the efforts your staff has made to acknowledge and address some of the most salient concerns facing marine mammal conservation and recovery today. We have had an opportunity to review the language in H.R. 4781. Below I will provide our comments on some of the major elements of the bill.

Take Reduction Plans

Adding Recreational Fisheries to the Take Reduction Process

The 1994 Amendments established a new approach to governing the incidental take of marine mammals by commercial fisheries. While these amendments provided us with the necessary tools to monitor and reduce incidental takes from commercial fisheries, the amendments did not provide the agency with similar authority to reduce takes from non-commercial fisheries. By not addressing incidental takes in these fisheries, efforts to reduce the impact of marine mammal bycatch in commercial fisheries are undermined. Therefore, the agency feels strongly that the regime to govern fisheries interactions in Section 118 would be greatly enhanced by including non-commercial fisheries in the take reduction plan process. We agree with H.R. 4781's intent to do this

The taking of marine mammals in the course of non-commercial fishing is a known problem in some instances. One example of the problem is situations in which non-commercial fishers use gear that is identical in design, manner, and location of deployment to commercial fishing gear. In addition to enabling NMFS to address all fishery-related sources of incidental marine mammal mortality and serious injury, expanding the take reduction program to include non-commercial fishers could provide non-commercial fisheries protection from prosecution for incidental taking that would otherwise be unauthorized.

While we agree with this bill's intent to include non-commercial fisheries in the take reduction plan development process, we are concerned that the proposed amendments do not provide NMFS with the necessary tools to adequately address incidental takes from non-commercial fisheries. The amendments would require NMFS to include incidental takes from recreational fisheries in estimates of mortality and serious injury for each take reduction plan. This information is already included in Stock Assessment Reports if available. Additionally, the amendments as written would only allow NMFS to address incidental mortality and serious injury from recreational fisheries in limited situations. Furthermore, the amendments do not subject recreational fisheries to the same requirements as commercial fisheries (e.g., registration and reporting, observer coverage, or compliance with take reduction plan regulations), which are critical components of the program. We have several ideas for ways to amend the MMPA to achieve this and would appreciate the opportunity to work more closely with the Subcommittee on the wording in this section to resolve this matter.

Required NMFS Representation on Take Reduction Teams

The Subcommittee's bill would require NMFS staff with specific responsibilities or expertise to serve as formal members of take reduction teams (TRTs). While it is useful to have such expertise available to the TRT, NMFS does not feel it is necessary to require such representation on TRTs for a number of reasons. First, NMFS already has the authority and flexibility to place representatives of Federal agencies, including NMFS, on take reduction teams when necessary. Second, TRTs as currently constructed offer a unique opportunity for public stakeholders and other entities to advise NMFS on ways to address incidental take of marine mammals. Third, NOAA General Counsel, and NMFS Regional Administrator representatives, scientists, and enforcement specialists are already actively involved in the take reduction plan development process. Finally, NMFS feels requiring this membership on teams would limit the agency's flexibility to bring in this expertise when it is most needed and could pose potential problems to the viability of the process if personnel and resources are limited. Rather than making this membership on a team a strict legal requirement, NMFS recommends that the Subcommittee simply encourage that such staff be present and active in TRT meetings, which is already the case.

Requirement to Reconvene the TRT after Take Reduction Plan Development

The Subcommittee's bill would require the Secretary to reconvene the Take Reduction Team before publishing any take reduction plan (TRP) that is different from the draft plan proposed by the TRT. NMFS feels this amendment is positive in intent, and believes it is important to conduct the TRP development process in as open a manner as possible. Therefore, the agency provides the TRT access to all the scientific and other information used to develop the final regulations implementing a TRP throughout the process. Additionally, the agency actively encourages TRT members to comment on the proposed regulations to implement the TRT.

Nonetheless, NMFS is concerned that the proposed language in the Subcommittee's bill is overly restrictive, as it could require the agency to reconvene the TRT regardless of the degree of change between the draft and proposed plans. Since TRTs do not submit their recommendations in regulatory form, some alteration is inevitable during this process. While changes may be substantial, the vast majority of changes made to a TRT's recommendations have been technical in nature, and therefore, relatively minor. Under the Subcommittee's proposed amendment, NMFS would be required to reconvene a TRT even for minor or trivial changes to a TRP. Such a requirement could lead to unnecessary delays in finalizing and implementing a TRP and unnecessary expense. NMFS recommends altering this section to give the agency the flexibility to either reconvene, or otherwise consult with, the team regarding changes to the TRP during the public comment period soliciting comments on the proposed TRP. This would allow NMFS to choose the most appropriate type of communication with the team depending on the nature of changes between draft and proposed TRPs, and would allow NMFS to address concerns that the TRT has with NMFS' changes before the proposed TRP becomes final. A requirement that the Secretary reconvene a TRT would intrude upon the President's management of the Executive Branch.

Pinniped Research

The Subcommittee's bill would require NMFS to initiate a research program to investigate non-lethal methods to remove or control nuisance pinnipeds. NMFS agrees that such a research program would be beneficial.

Prohibition on Release of Captive Marine Mammals

NMFS concurs with the clarification that it is unlawful to release any captive marine mammal without prior authorization, with the understanding that this provision should not include releases from temporary captivity or holding during permitted research, releases related to strandings, or releases or disentanglements from fishing gear or line which are covered under other authorities of the MMPA. Within the scientific community, the release of marine mammals held in captivity for extended periods of time is regarded as potentially harmful to both the animals released as well as the wild populations they encounter. Fundamental questions remain as to the ability of long-captive marine mammals to forage successfully, avoid predators, and integrate with wild populations. Unauthorized releases pose serious risks of disease transmission, inappropriate genetic exchanges, and disruption of critical behavioral patterns and social structures in wild populations.

Clarifying Authorization for Native Exports

The 1994 MMPA amendments authorized imports of marine mammal products in conjunction with travel outside the United States by a U.S. citizen, or for purposes of cultural exchange between Native inhabitants of Russia, Canada, or Greenland and Alaska Natives. However, the provision did not accommodate corresponding exports. The Subcommittee's bill would close the loop to clarify that exports, as well as imports, are permissible under the MMPA subject to certain conditions. NMFS agrees with this proposed change. There are, however, other sections of the MMPA that could also be affected by this proposed change including, but not limited to, the legal sale of handicrafts sold by Native Alaskans intrastate, but not allowed for export. We would be pleased to work with the Committee to make sure that this proposed change is consistently applied throughout the MMPA.

Other Reauthorization Issues

In addition to the above comments on H.R. 4781, I would like to discuss several other areas that the agency feels warrant attention during the MMPA reauthorization process. As I mentioned in my October 2001 testimony, Mr. Chairman, NMFS has been working in conjunction with the FWS, the Marine Mammal Commission, and other government agencies to develop an administration proposal to amend the MMPA. The legislation is still under administration review and awaits formal transmittal to Congress. While I can not discuss the specific contents of that bill at this time, I would like to present thoughts on some general themes that NMFS addressed throughout the development of the administration bill.

Definition of Harassment

The definition of "harassment," a critical component of a "taking," has broad applicability throughout the MMPA. The definition has been formulated in two parts. Level A harassment is currently defined as, "any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild." Level B harassment is defined as, "any act of pursuit, torment, or annoyance which has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering."

As I stated in my testimony last October, NMFS has experienced difficulties with interpretation, implementation, and enforcement of the current harassment definition. On one hand, activities that may be likely to disturb marine mammals are not necessarily controlled unless they are clearly acts of "pursuit, torment, or annoyance," which are not defined in the MMPA. On the other hand, one could argue that

activities that have even minimal effect on marine mammals could fall under the category of Level B harassment, as this part of the definition is currently written. In effect, the harassment definition is so broad we are concerned that it could be essentially meaningless, and therefore, does not provide the public and NMFS with effective guidance on prohibited or regulated acts. The breadth of the definition also makes it difficult for the agency to prioritize its resources to deal with the types of harassment that have the most negative effects on marine mammals. Therefore, we believe there is a need to tighten the definition of harassment and reduce the ambiguity to clarify when a given activity would be considered harassment.

We have been working with our constituents and other Federal agencies to refine the definition of "harassment" to better identify those activities of concern that are either (1) directed at marine mammals such as viewing, swimming, or interacting with the animals, or (2) likely to disturb a marine mammal by causing a disruption of natural behavioral patterns to a point where such behavioral patterns are abandoned or significantly altered.

NMFS supports clarification of the definition of "harassment," such as that proposed by the Administration through the Readiness and Range Preservation Initiative contained in the 2002 Department of Defense Authorization legislative proposal. We recognize the importance of this change to ensuring the ability of our nation's military to train effectively. However, we believe that a similar clarification of the harassment definition in the Marine Mammal Protection Act should also be made that will apply broadly to all activities and operations, not merely those pertaining to military readiness.

Traveling Exhibits

We have become increasingly concerned about the risks posed to cetaceans by traveling exhibits. Unlike some marine mammals, such as polar bears, seals and sea lions, which spend time in both aquatic and terrestrial environments, cetaceans must remain buoyant at all times. Therefore, their health and survival depends heavily on having a continuously clean and safe aquatic environment, conditions that are difficult to maintain when transport is so frequent. Because transporting cetaceans is difficult and risky for cetaceans, traveling exhibits would place the animals under enormous stress. We ask that Congress consider this issue during MMPA reauthorization.

Harvest Management Agreements

The 1994 MMPA amendments enabled NMFS to enter into cooperative agreements with Alaska Native organizations to conserve marine mammals and co-manage subsistence use by Alaska natives. NMFS believes these amendments provided a great beginning and that the program has yielded some success, evidenced by the agreements the agency has reached to co-manage subsistence harvest of harbor seals, beluga whales, and other marine mammals. Nonetheless, the effectiveness of these agreements at this point relies on voluntary compliance by Alaska natives, since there is no mechanism under the MMPA to enforce any restrictions developed through harvest management agreements for subsistence purposes. The harvest management system would be greatly strengthened by providing a mechanism to enforce subsistence harvest restrictions developed through these agreements. Additionally, the program would be enhanced by providing a mechanism to address subsistence harvest prior to the designation of a marine mammal stock as depleted. Such a change would allow for more effective use of harvest management agreements when they can help prevent future depletion of Alaska marine mammal stocks. NMFS has been working with the U.S. Fish and Wildlife Service, the Marine Mammal Commission, and Alaska natives on a proposal to address these issues. The Administration looks forward to presenting this proposal as part of its reauthorization package.

Fisheries Gear Development

The incidental take of marine mammals in the course of fishing operations continues to be a large source of mortality and injury to marine mammals. The development of new gear and gear deployment technologies has already proven effective at reducing incidental takes. For example, the development of acoustic deterrent devices, or "pingers," has helped reduce incidental takes of harbor porpoises in New England waters. We believe programs that encourage and facilitate the development, testing, and evaluation of new gear technologies are key to reducing marine mammal entanglements while allowing fishers to operate in areas that marine mammals frequent. We hope that Congress will consider and support such programs.

Enhancing Enforcement

While several sections of the MMPA have been updated since the Act was first passed in 1972, some areas are extremely outdated. One such area is the penalties that may be imposed for violations of the MMPA. Currently, individuals who violate the MMPA are subject to civil penalties of up to \$10,000 and criminal fines of up to \$20,000. These penalties have been unchanged since 1972. While these levels are appropriate in some cases, they have proven grossly inadequate in others, undermining effective enforcement of the Act. To enhance enforcement of the MMPA, Congress may wish to consider increasing penalties and other means of ensuring compliance with the MMPA.

Conclusion

The MMPA has benefitted U.S. marine mammal stocks and has served as a model for marine mammal conservation and management policies and programs around the world. The 1994 Amendments have enabled NMFS to take significant strides forward in the conservation of marine mammals over the past decade. Now reauthorization is upon us again and managers, policymakers, and other interest groups have an important opportunity to consider the lessons we have learned since 1994 and come up with new and constructive ways to further advance our management and protection of marine mammals. Mr. Chairman, I look forward to working with you, the Subcommittee, and your staff to identify and formulate effective ways to better protect marine mammals while balancing human needs throughout this reauthorization process.

This concludes my testimony. I thank you again for the opportunity to testify before your Subcommittee today and would be happy to answer any questions you may have.

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